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FEB 3 1960
JAMES R. BROWNING, Clerk

No. 624

In the Supreme Court of the United States

OCTOBER TERM, 1959

CHARLIE JOE VAUGHN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. 10) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 1959 (Pet. 11). A petition for a rehearing was denied on December 3, 1959 (Pet. 11). The petition for a writ of certiorari was filed on December 31, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether consolidation for trial of three indictments charging violations of the internal revenue

laws generally related as to time, place and nature constituted prejudicial error.

2. Whether the evidence was sufficient to support the conviction.

STATUTES AND RULES INVOLVED

26 U.S.C. (1952 ed. Supp. V) 5008 provides in pertinent part:

* * * * * *

(b) *Stamps for containers of other distilled spirits.*

(1) *Requirements.*

No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof has affixed thereto in such manner as to be broken on opening the container, a stamp evidencing the tax or indicating compliance with the provisions of this chapter. * * *

* * * * * *

26 U.S.C. (1952 ed. Supp. V) 5174 provides in pertinent part:

(a) *Requirement.*

Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register such still or apparatus with the Secretary or his delegate immediately on its being set up, by subscribing and filing with the Secretary or his delegate a statement, in writing, setting forth the particular place where such still or distilling apparatus is set up, the kind of still and its cubic contents, the owner thereof, his place of resi-

dence, and the purpose for which said still or distilling apparatus has been or is intended to be used: * * *

* * * * *

26 U.S.C. (1952 ed. Supp. V) 5601 provides in pertinent part:

> * * * Every person having in his possession or custody, or under his control, any still or distilling apparatus set up which is not registered, as required by section 5174, shall pay a penalty of $500, and shall be fined not more than $1,000, and imprisoned not more than 2 years.

26 U.S.C. (1952 ed. Supp. V) 5180 provides in pertinent part:

> (a) *Requirement.*
>
> Every person engaged in distilling shall, in such manner and form as the Secretary or his delegate may by regulations prescribed, place and keep conspicuously on the outside of the place of such business a sign, exhibiting in plain and legible letters the name or firm of the distiller, with the words: "registered distillery."

* * * * *

26 U.S.C. (1952 ed. Supp. V) 5681 provides:

> Every person engaged in distilling or rectifying spirits, and every wholesale liquor dealer, who fails or refuses to post the sign required by sections 5116, 5180, or 5274 shall pay a penalty of $500. Every person, other than a rectifier or wholesale liquor dealer who has paid the special tax, or a distiller who has given bond as required by law, who puts up or keeps

up the sign required by such sections, or any sign indicating that he may lawfully carry on the business of a distiller, rectifier, or wholesale liquor dealer, shall forfeit and pay $1,000, and shall be imprisoned not more than 6 months. Every person who works in any distillery, rectifying establishment, or wholesale liquor store, on which no such sign is placed and kept, as required by law, and every person who knowingly receives at, or carries or conveys any distilled spirits to or from, any such distillery, rectifying establishment, warehouse, or store, or who knowingly carriers and delivers any grain, molasses, or other raw material to any distillery on which such sign is not placed and kept, shall forfeit all vehicles, aircraft or vessels used in carrying or conveying such property, and shall be fined not more than $1,000, or imprisoned not more than 6 months.

26 U.S.C. (1952 ed. Supp. 5) 5686 provides in pertinent part:

* * * * *

(b) *Penalty for having, possessing or using liquor or property intended to be used in violating provisions of this chapter.*

It shall be unlawful to have or possess any liquor or property intended for use in violating the provisions of this chapter, or regulations prescribed thereunder, or which has been so used, and every person so having or possessing or using such liquor or property, shall be liable to a fine not to exceed $5,000, or to imprisonment for not more than 1 year, or both.

* * * * *

Rule 8 of the Federal Rules of Criminal Procedure provides:

> *Joinder of Offenses and of Defendants.*
>
> (a) *Joinder of Offenses.* Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> (b) *Joinder of Defendants.* Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 13 of the Federal Rules of Criminal Procedure provides:

> *Trial Together of Indictments or Informations.* The court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information.

STATEMENT

1. Three indictments filed in the United States District Court for the Southern District of Georgia, Savannah Division, charged the petitioner with violations of the alcohol tax provisions of the Internal Revenue Code (26 U.S.C. (1952 ed. Supp. V) Ch. 51) as follows:

Indictment No. 14932, filed on February 11, 1958, in one count charged the petitioner and one Edward Charles Deal with unlawful possession on August 20, 1957, in Tattnall County, of 65 one-hundred-pound bags and 25 sixty-pound bales of sugar intended for use in the operation of an illegal distillery in violation of 26 U.S.C. (1952 ed. Supp. V) 5686 (R. 2).

Indictment No. 14949, returned on the same day, charged in one count that the petitioner alone violated the same code provision on December 2, 1957, with unlawful possession in Charlton County of 35 sixty-pound bales of sugar intended for use in an illegal distillery (R. 93-94).

Indictment No. 15123, filed on November 12, 1958, charged violations in four counts of 26 U.S.C. (1952 ed. Supp. V) 5174, 5180, 5681 and 5008 in that the petitioner and James Billy Deal on May 28, 1958, in Tattnall County unlawfully possessed or controlled an unregistered still (Count 1), unlawfully possessed or controlled a still not exhibiting the required sign (Count 2), unlawfully worked in a distillery not exhibiting the required sign (Count 3), and unlawfully possessed ten gallons of non-taxpaid whiskey in five containers which did not have required stamps

affixed so as to be broken on opening of the containers (Count 4) (R. 101–102).

On February 10, 1959, the Government moved for consolidation of the indictments for trial (R. 6). Over objection by defense counsel, the court granted the motion (R. 7–8). Thereupon the trial proceeded on all three indictments before a jury. The petitioner was found guilty on all counts of each indictment[1] (R. 5, 95, 104). He was sentenced to imprisonment for two years on Indictment No. 15123 (R. 104-105), one year on Indictment No. 14949 (R. 96–97), and one year on Indictment No. 14932 (R. 78–80), the latter two terms to run concurrently with each other and with the sentence imposed in No. 15123. The court of appeals affirmed per curiam (Pet. 10).

2. At trial, evidence of following facts was presented:

a. On August 20, 1957, state officers arrested the petitioner and Edward Deal and seized a truck and sedan belonging to the petitioner. A federal officer, when called, found in the truck 60 one-hundred-pound bags of sugar and in the sedan 25 sixty-pound bales and a five-hundred-pound bag of sugar (R. 11). When questioned, the petitioner said the sugar was his own, that he had hired Deal to assist him in transporting it, and that he had bought it for the purpose of reselling it for a profit to a man whom he refused to name. He said that he had been travelling at night because it was cooler then (R. 13).

[1] James Billy Deal was found guilty on all counts of No. 15123 (R. 104). Edward Charles Deal was acquitted on No. 14932 (R. 5).

On December 2, 1957, at 2:30 in the morning, federal agents stopped a 1941 Cadillac, driven by the petitioner and known to belong to him, on a highway. The car was loaded with 35 sixty-pound bales of sugar and had an unmistakable odor of whiskey. The petitioner's first words were: "Well, I was going to put an extra leaf under the back spring but I am glad I didn't spend the money, since you caught me anyway." He said he had obtained the sugar at a grocery but he had no invoice or consignment. Asked about his destination, he said he had two or three people in mind whom he thought would buy it but he did not know their names (R. 41–43).

On May 28, 1958, federal and state officers, proceeding to a site where a distillery had been known to operate, saw ahead of them two vehicles parked on the side of the road with the petitioner and two other men standing beside them. (R. 17, 24–25, 30). A search of one of the cars revealed a quart bottle that contained about a tablespoon of "moonshine" whiskey. There was also a three-gallon bucket of mash—or mixed grain in a state of fermentation (R. 18, 26). On the ground nearby was a fresh wet spot on the sand which had the odor of "moonshine" whiskey (R. 18).

The officers seized the car, arrested the petitioner and took him to jail, but released him with instructions to report for appearance before the Commissioner on the following day (R. 18). They then proceeded back to the site of the distillery, where they found the apparatus hot and showing signs of having been used that day. There were five buckets

of whiskey around. The officers remained in the vicinity, keeping out of sight, until they heard noises indicating that the distillery was being dismantled (R. 18). One of the officers saw, at close range, the petitioner and Billy Deal carrying gas cylinders. The petitioner glimpsed the officer and then "everybody flew" (R. 32–33). The petitioner and Deal jumped into a '39 or '40 Chevrolet with green doors and drove away; the car was later abandoned on the highway (R. 36, 38–40).

b. The petitioner took the stand in his own defense (R. 48). He admitted having been stopped by the officers on August 20, 1957, when he was carrying 8000 pounds of sugar (R. 48) and again on December 2, 1957, carrying 2100 pounds (R. 54–55). In both instances, he said, he was taking the sugar to sell to alleged purchasers at $2.00 and $2.50 profit per hundred pounds but he did not know the business of either purported purchaser (R. 49, 53, 54, 55, 57). He had sold sugar to one of these persons before, delivering it to a dwelling house (R. 56). He did not subpoena these persons to testify in his behalf because in one instance the alleged purchaser was dead (R. 53), and, as to the other, he did not think he would need him (R. 56). He admitted that he was not in the wholesale sugar business and that a purchaser could have bought this sugar at the same price he did (R. 53, 54).

The petitioner denied that he had been at the still on May 28, 1958 (R. 50). He admitted that he had been seen that afternoon standing by his automobile about a mile from the described location (R. 57).

The tub of what was described as mash, he said, was actually wet scratch feed which he had found that morning and which was destined for his chickens (R. 57–58).

James Billy Deal denied that he had ever been at the still (R. 60). He said he had owned a 1946 Chevrolet with green doors, that he had loaned it to the petitioner, that he never got it back and could not account for its abandonment (R. 61–62).

Edward C. Deal testified that he had been hired by the petitioner to drive the carload of sugar on August 20, 1957 (R. 64) and that he did not know his destination but was only following the petitioner (R. 66).

3. In its charge to the jury, the court reviewed each indictment, and each count of the multi-count indictment, separately (R. 68–72), and instructed that the jury must return separate and distinct verdicts as to each (R. 72–73, 77).

ARGUMENT

1. The petitioner complains that the three indictments returned against him were improperly consolidated for trial. The facts do not support his contention.

The offenses charged were either of the same or similar character. See Rule 8(a) of the Federal Rules of Criminal Procedure. Two of the indictments charged unlawful possession, on two different dates, of sugar intended for use in violating the internal revenue laws. The third, drawn under companion provisions of the same chapter of the internal revenue laws, charged the control and working presence at an

unregistered and undesignated distillery and the possession there of unstamped containers of liquor. Therefore, as to offenses, the joinder of the indictments was permissible in the discretion of the trial judge, within the literal meaning of the Rules and the cases. See *Pointer* v. *United States*, 151 U.S. 396.

The petitioner contends, however, that he was prejudiced by the joinder of offenses and resultant joinder of defendants (see Rules 8(b), 13). He, however, was named in all three indictments and the evidence, confirmed by the petitioner's own admissions, established him as the principal defendant. It was he who procured the sugar and the help of one of the other defendants to haul it. The development of the evidence as to both the other defendants could have in no way "embarrased or confounded" him in his defense. See *Pointer*, *supra*, at 404. He admitted possession of the sugar; his defense was that he possessed it for legitimate purposes. As to presence in the illegal distillery, both he and his co-defendant denied altogther that they had ever been there.

The jury could not have been confused. See *United States* v. *Lotsch*, 102 F. 2d 35 (C.A. 2), certiorari denied, 307 U.S. 622. The evidence was developed separately in orderly fashion. One federal officer testified first as to the facts relative to the possession of sugar on August 20, 1957, admitted by the petitioner, and subsequently as to his observations at the illegal distillery on May 28, 1958. Another federal officer and a local sheriff corroborated and amplified his testimony relative to the May 28th crime. Lastly, a third officer testified as to the circumstances surrounding the peti-

tioner's admitted possession of sugar on December 2, 1957. The issues were simple—the question of intent, and the belief or disbelief of the testimony of an officer that he saw the petitioner at an illegal still. The court in its instructions to the jury cautioned repeatedly, at the beginning and end of its charge, that the evidence and the indictments should be considered separately. The record affirms that the petitioner has had a fair trial.

The petitioner urges (Pet. 8) that *McElroy* v. *United States*, 164 U.S. 76, requires reversal even though there has been no showing of prejudice. In that case, this Court reversed convictions where there had been consolidation of four indictments charging distinct offenses—two of arson and two of assault with intent to kill—and where six persons were named in three of the indictments and only three of the six persons named in the remaining indictment. The Court reaffirmed the general rule permitting joinder of several felonies of the same general nature requiring the same mode of trial and punishment but concluded that "such joinder cannot be sustained where the parties are not the same and where the offences are in nowise parts of the same transaction and must depend upon evidence of a different state of facts as to each or some of them" (164 U.S. at 81).

In *McElroy*, unlike the instant case, the offenses were totally unrelated, even as to class (164 U.S. at 79). The decision has been distinguished in numerous cases where the facts have revealed a "clearly discernible pattern of action" (*United States* v. *Rosenfeld*, 235 F. 2d 544, 545 (C.A. 7), certiorari denied,

352 U.S. 928), a "close relationship among the transactions," (*Ross* v. *United States*, 197 F. 2d 660, 664 (C.A. 6), certiorari denied, 344 U.S. 832), or "a 'series of acts or transactions' in which series, if not in each of its members, all * * * defendants participated," *Schere* v. *United States*, 184 F. 2d 695, 696 (C.A.D.C.). The Court of Appeals for the Second Circuit has noted that the mere fact that the accused are different is no longer important; the propriety of joinder is measured by the danger created that the jury may confuse the issues. *United States* v. *Liss*, 137 F. 2d 995, 998 (C.A. 2), certiorari denied, 320 U.S. 773. There was no danger of confusion here.

2. There is no merit to the contention that the evidence is insufficient to support the conviction. The petitioner admittedly was hauling thousands of pounds of sugar in an area where an illegal still was known to operate. The jury justifiably found his attempt to explain his action as a legitimate selling operation to be incredible. Moreover the longest sentence, which in itself supports the judgment, was imposed on indictment No. 15123, involving his relationship to the illegal distillery. This was proved by the testimony of a credible eyewitness and corroborated as to time and circumstances by two other witnesses.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1960.